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**SOAH DOCKET NO. 473-23-18990
PUC DOCKET NO. 54659**

APPLICATION OF EL PASO	§	BEFORE THE STATE OFFICE
ELECTRIC COMPANY FOR	§	
APPROVAL OF A GENERATION	§	OF
COST RECOVERY RIDER RELATED	§	
TO NEWMAN UNIT 6	§	ADMINISTRATIVE HEARINGS

**OFFICE OF PUBLIC UTILITY COUNSEL’S RESPONSE TO
EL PASO ELECTRIC COMPANY’S OBJECTIONS TO
THE DIRECT TESTIMONY OF EVAN EVANS**

The Office of Public Utility Counsel (“OPUC”), representing the interests of residential and small commercial consumers in Texas, respectfully submits this Response to El Paso Electric Company’s (“EPE”) objections to and motion to strike portions of the direct testimony of OPUC’s witness Evan D. Evans (“Evans Direct”) in this proceeding. OPUC will show EPE’s objections and motion to strike portions of Evans’s Direct are without merit and would unduly limit the evidence the Administrative Law Judges and the Public Utility Commission of Texas (“Commission”) are able to consider in this case of first impressions.

I. BACKGROUND

On June 22, 2023, OPUC filed its Direct Testimony and Workpapers of Evan D. Evans.¹ On June 29, 2023, EPE filed objections to and motion to strike portions of the direct testimony of OPUC’s witness, Mr. Evans.² As established in the State Office of Administrative Hearings’ Order Adopting Procedural Schedule and Setting Hearing on the Merits, the deadline to file a response to objections to Intervenor’s direct testimony is July 6, 2023.³ Therefore, this response is timely filed.

¹ The Office of Public Utility Counsel’s (“OPUC”) Direct Testimony and Workpapers of Evan D. Evans (June 22, 2023). (“Evans Direct”).

² El Paso Electric Company’s Objections to Direct Testimony of Evan Evans (June 29, 2023). (“Objection”).

³ Adopting Procedural Schedule and Setting Hearing on the Merits at 2 (May 24, 2023).

II. INTRODUCTION

EPE argues that certain sections of the direct testimony of OPUC's expert, Mr. Evans, are irrelevant and immaterial to the issues to be decided in this docket,⁴ claiming that Mr. Evans's testimony is irrelevant because it is of no consequence to the issues that need to be determined in this proceeding.⁵ EPE also argues that Mr. Evans's testimony concerning the difference between the actual costs included in the applicant's Generation Cost Recovery Rider ("GCRR") filing and the estimated costs for the Newman Unit 6 as set out in Certificate of Convenience ("CCN") case, Docket No. 50277, is specifically prohibited by 16 TAC § 25.248 ("GCRR Rule").⁶

EPE objected to the following sections of Evans Direct as irrelevant and immaterial, but did not provide specific objections for each section and did not state specific justification to strike each identified section:

- Section II, page 7, lines 3-5;
- Section IV, page 9, line 4 – page 14, line 2;
- Section V, page 14, line 17 – page 15, line 18; and
- Section VII, page 18, lines 9-12.

EPE argues these sections of Evans Direct are irrelevant and immaterial because, "A GCRR filing is intended to be a streamlined proceeding to reduce regulatory lag through a simple interim cost recovery mechanism."⁷ EPE further posits that a GCRR case should be "very narrow in scope, focused solely on recovery of actual invested capital for a power generation facility recorded in certain FERC accounts, through rates that will be charged temporarily until a reconciliation can take place in the next base rate case."⁸ Furthermore, EPE asserts that "the (GCRR) rule specifically prohibits estimated costs from inclusion in GCRR rates."⁹ Finally, EPE argues that Mr. Evans's testimony comparing the actual net invested capital through December 2022 that EPE seeks to recover through this GCRR to the cost estimate EPE provided in Docket

⁴ *Id.* at 1.

⁵ *Id.* at 1 - 2.

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2.

No. 50277 only has meaning relative to a determination as to the reasonableness and necessity of the invested capital included in EPE's application. OPUC disagrees. While it is true that the GCRR expressly prohibits the Commission from addressing those issues in a GCRR filing,¹⁰ that is not what we are asking the Commission to do here.

Insofar as the prudence of Newman Unit 6 was a component of the Commission's Preliminary Order in Docket No. 50277,¹¹ the Commission's final Order, which adopted the proposal for decision, does convey that "the Commission did not determine the prudence of [EPE] constructing Newman Unit 6 or the degree, if any to which [EPE] will be able to recover the costs of Newman Unit 6 in rates."¹² OPUC is not suggesting or recommending that the Commission engage in a prudence review. OPUC is merely bringing to light the fact that the amount that EPE is requesting is an extraordinary and unreasonable overage from the Commission's determination, in a competitively bid project, that the "overall estimated total cost [is] \$157.6 million for Newman Unit 6, excluding any associated transmission interconnection costs at the Newman Generating Station or other transmission upgrades."¹³ While prudence is no longer an issue,¹⁴ it is worth noting the GCRR rule is intended to implement Public Utility Regulatory Act ("PURA") § 36.213, as added by House Bill 1397. The intent of the Legislature in enacting HB 1379 is succinctly clear in the House Bill Analysis (Engrossed) that the PUC is authorized "to approve an application for a rider to recover the electric utility's *reasonable and necessary* power generation investment and costs associated with that investment." [Emphasis added.] OPUC would therefore contend, prudence aside, that the reasonable and necessary investment and associated costs has been defined by the Commission's prior Order as to the total estimated costs in Docket No. 50277. Furthermore, House Bill 1397's Author's/Sponsor's Statement of Intent makes clear that "[t]he goal of the rider is to reduce regulatory lag – the time period between the date that infrastructure is placed in service

¹⁰ *Id.* at 2-3.

¹¹ *Application Of El Paso Electric Company to Amend Its Certificate Of Convenience And Necessity For An Additional Generating Unit At The Newman Generating Station In El Paso County And The City Of El Paso*, Docket No. 50277, Preliminary Order at 4 (Feb. 27, 2020).

¹² *Application Of El Paso Electric Company to Amend Its Certificate Of Convenience And Necessity For An Additional Generating Unit At The Newman Generating Station In El Paso County And The City Of El Paso*, Docket No. 50277, Order at 13 (Oct. 16, 2020). (Docket No. 50277 Final Order).

¹³ Docket No. 50277 Final Order at 8.

¹⁴ Docket No. 50277 Final Order at 4, 8.

and the date a utility may start recovering its investment.”¹⁵ EPE’s Newman Unit 6 has not been placed in service, and adoption of the cap as set out in the prior Commission order does not impose any sort of regulatory lag. Furthermore, if EPE wishes to do so, it can avail itself of the process outlined by 16 TAC § 25.248(h) and within 60 calendar days after its power generation facility begins providing service to its customers, file an application to update the GCRR to reflect the actual capital investment in the power generation facility.

EPE also specifically objected to Section VI, page 16, line 3 - page 17, line 13 of Evans Direct, concerning a proposed cap on generation invested capital to be included in the GCRR rates for Newman Unit 6. EPE argued the testimony is irrelevant and immaterial because, “Neither the GCRR Rule’s definition of generation invested capital nor the formula used to calculate the rates contemplates any cap on the amount of invested capital that can be recorded in those accounts.”¹⁶

OPUC argues that Mr. Evans’s testimony is relevant to issues in EPE’s GCRR filing for the reasons stated herein and provides material information that will enable the Commission to make informed decisions in this docket. Evans Direct provides information that is necessary to enable the Commission to appropriately apply reasonable and responsible regulatory oversight and to make fully informed decisions concerning the appropriate amount of EPE’s actual, incurred costs for Newman Unit 6 that should be recovered through a GCRR. Furthermore, neither the GCRR Rule, nor its enabling statute, PURA § 36.213, prohibit the establishment of a cap on the amount of invested capital that can be recovered through a GCRR. Also, the application of a cap on the amount of invested capital that is recovered through a GCRR would be simple and would have no material impact on the streamlined nature of GCRR filings.

This docket is a case of first impression due to the fact that EPE is only the second utility to request a GCRR¹⁷ and this is the first case in which a utility has requested recovery of actual costs that exceeded the estimated total cost included in the approved CCN for the new generating facility. Therefore, it is vitally important the Commission has all the information necessary to be

¹⁵ See H.B. 1397 Bill Analysis at 1 (Apr. 22, 2019).

¹⁶ Objection at 4-5.

¹⁷ See *Application of Entergy Texas, Inc. to Establish a Generation Cost Recovery Rider Related to the Montgomery County Power Station*, Docket No. 51381 (Jan. 14, 2022).

fully informed and make a just and reasonable decision on the amount of invested capital and associated costs for Newman Unit 6 that EPE should be permitted to recover through a GCRR before any determination of the reasonableness or prudence of costs have been made. OPUC stands by its assertion that EPE should be required to comply with the order in the CCN case and all amounts in excess of the Order should be the subject of a separate proceeding.

III. DISCUSSION OF TESTIMONY SECTIONS TO WHICH EPE OBJECTS

Each of the first four sections of Evans Direct to which EPE objects is relevant to issues the Commission should address in EPE's GCRR filing and provides material information that will enable the Commission to make informed decisions in this docket.

Section II, page 7, lines 3-5

These three lines are in the "Purpose and Scope of Testimony" section of Evans Direct. These lines simply identify an issue related to the net invested capital in Newman Unit 6 that EPE has requested to recover through a GCRR. This section merely discusses how the net invested capital in Newman Unit 6 that EPE is requesting compares with the cost estimates EPE provided in Docket No. 50277. OPUC argues this discussion is relevant because the only other time a GCRR has been filed, the utility did not request any amount over their estimate in the corresponding CCN.¹⁸

Section IV, page 9, line 4 – page 14, line 2

Section IV of Evans Direct provides additional comparisons of the amount of requested net invested capital in the Newman Unit 6 GCRR to the estimate provided in Docket 50277. This comparison is important in enabling the Commission to understand the level of cost that customers were expected to bear for Newman Unit 6 when the CCN was approved to the level of costs EPE is requesting to be recovered through a GCRR, an interim cost recovery mechanism. As previously stated, EPE's filing is the first request by a utility to request recovery of costs through a GCRR in excess of those included by the utility in the CCN case and evaluated by the Commission and parties to that case.

¹⁸ See *Application of Entergy Texas, Inc. to Amend its Certificate of Convenience and Necessity to Construct Montgomery County Power Station in Montgomery County*, Docket No. 46416 (Jul. 28, 2017).

Furthermore, in Section IV, Mr. Evans explains that despite the fact that the current final cash construction cost for Newman Unit 6 is over 26% more than the amount EPE included in its CCN case,¹⁹ EPE never communicated to the Commission, or to other parties, that Newman Unit 6 was expected to cost dramatically more than EPE had indicated in the CCN case.²⁰ Therefore, the information presented in Section IV of Evans Direct will provide the Commission with more complete information on which to evaluate this request and to make decisions it has not been previously required to make about issues that will have unexpected impacts on customers' bills.

Section V, page 14, line 17 – page 15, line 18

In this section of Evans Direct, Mr. Evans specifically identifies the potential impacts on current EPE customers that could result from permitting EPE to include investment cost for Newman Unit 6 that are drastically above the costs EPE included in the Newman Unit 6 CCN case. This section provides valuable information for the Commission to consider when it makes its decisions on EPE's proposed GCRR and its potential impacts on customers. In addition, this section presents OPUC's recommendation to permit EPE to recover a GCRR that includes the Texas retail allocated portion of the actual investment in Newman Unit 6 as of December 31, 2022, including allowance for funds used during construction ("AFUDC"), up to the Texas retail allocated portion of the total estimated net invested capital EPE included in the Newman Unit 6 CCN filing.

The Commission has the responsibility and authority to ensure the rates and charges for the utilities it regulates are just, reasonable, nondiscriminatory, and do not unduly impact customers. There is no provision in PURA § 36.213 or in the GCRR Rule, that relieves the Commission of that responsibility or divests the Commission of its authority relative to GCRR rates and charges. Therefore, this section of testimony is relevant and provides material information that will enable the Commission to make informed decisions that will impact customers' bills.

¹⁹ Evans Direct at 13:3 – 14.

²⁰ *Id.* at 13:15 – 14:2.

These lines of Evans Direct restate OPUC's recommendation to permit EPE to recover a GCRR that includes the Texas retail allocated portion of the actual investment in Newman Unit 6 as of December 31, 2022, including AFUDC, up to the Texas retail allocated portion of the total estimated net invested capital EPE included in the Newman Unit 6 CCN filing. For the reasons stated in the above section, this section of testimony is relevant and provides material information that will enable the Commission to make informed decisions that will impact customers' bills.

IV. THE IMPACT OF A CAP ON THE STREAMLINED NATURE AND NARROW FOCUS OF GCRR FILING

EPE argued that the application of a cap on the amount of invested capital that a utility would be permitted to recover through a GCRR would impact the streamlined proceeding and narrow focus of a GCRR filing. However, EPE provided nothing to support their argument.

The application of a cap on the amount EPE is permitted to recover through their GCRR would require nothing more than a small adjustment to EPE's cost calculation. This adjustment would limit capital investment to no more than the amount EPE included in the Newman Unit 6 CCN case and the return, income taxes, depreciation expense, and other associated costs would be adjusted based on that level of capital investment. This adjustment would not measurably impact the streamlined nature of the GCRR proceeding, or its narrow focus.

V. USE OF A CAP BASED ON EPE'S NEWMAN UNIT 6 COSTS FROM THE CCN CASE AND THE PROHIBITION AGAINST USING ESTIMATED COSTS

In EPE's Objection filing, EPE argued the use of a cap based on the estimated costs for Newman Unit 6 that EPE included in the CCN case would violate the GCRR Rule's prohibition against including estimated costs in GCRR rates.²¹ However, OPUC's recommendation to limit the amount of capital investment in Newman Unit 6 to the cost EPE included in the Newman Unit 6 CCN case does not violate the GCRR Rule's prohibition against including estimated costs in GCRR rates. OPUC's recommendation would not require the calculation of EPE's GCRR rates to

²¹ Objection at 2.

include any estimated costs, but simply makes clear that the actual capital costs included in GCRR rates do not exceed the costs EPE presented in the CCN case. Therefore, OPUC's proposed cap does not violate the GCRR Rule.

VI. PROHIBITION AGAINST ADDRESSING REASONABLENESS, PRUDENCE, AND NECESSITY OF COSTS

EPE argued the comparison of EPE's total actual capital investment costs for Newman Unit 6 to the costs EPE included in the CCN case only has meaning in the determination as to the reasonableness and necessity of the invested capital included in EPE's application. EPE correctly states, "The GCRR rule expressly prohibits the Commission from addressing those issues in this docket, as the Commission's Preliminary Order recognizes."²²

However, this comparison and the application of a cap on EPE's total capital investment costs for Newman Unit 6 that can be recovered through a GCRR does not require a determination of the reasonableness, necessity, or prudence of EPE's actual total capital investment cost for Newman Unit 6. The projected cost of the generation facility was established through a competitive bidding process and included in the Finding of Facts in both the Proposal for Publication and the Commission's Final Order in Docket No. 50277. The cost of the generation facility was therefore fully litigated in and determined in Docket No. 50277. The comparison and application of the cap would simply establish the maximum amount of capital investment costs that EPE would be permitted to recover through a GCRR. This issue was addressed directly in Evans Direct from page 16, line 14 through page 17, line 17.

The establishment of a cap on total investment in Newman Unit 6 that EPE is permitted to include in a GCRR to the level EPE provided in the CCN case would be the implementation of a reasonable and responsible regulatory practice by the Commission. The Commission would not be required to make any determination of reasonableness or prudence of EPE's capital investment in this proceeding as it will be implementing its order in Docket No. 50277. Those determinations would continue to be reserved for consideration in EPE's next base rate case.

²² *Id.* at 4.

VII. AUTHORITY OF THE COMMISSION TO APPLY A CAP ON INVESTMENT RECOVERED THROUGH A GCRR

EPE also objected to Section VI, page 16, line 3 – page 17, line 13 of Evans Direct concerning a proposed cap on generation invested capital to be included in the GCRR rates for Newman Unit 6 is irrelevant and immaterial evidence that should be excluded. EPE argued that neither the GCRR rule’s definition of generation invested capital nor the formula used to calculate the rates contemplates any cap on the amount of invested capital that can be recorded in those accounts. EPE also reasserted their claim that imposition of a cap on invested capital included in a GCRR application amounts to a presumption that any amount over the cap is unreasonable or unnecessary, or that they were imprudently incurred.

However, EPE’s claim that this section of Evans Direct is irrelevant and immaterial is without merit. The fact that the GCRR Rule’s definition of generation invested capital and the formula used to calculate the GCRR rates do not discuss the application of a cap does not mean that the Commission is prohibited from exercising regulatory authority and implementing sound regulatory policy by applying such a cap.²³ As stated before, the prior CCN set the cost, including a contingency, for this GCRR, therefore, the implementation of such “cap” is not a novel idea to be applied in this GCRR, rather a suggestion that EPE be required to comply with the Order in the CCN case. The Commission has the responsibility and authority to ensure the rates and charges for the utilities it regulates are just, reasonable, nondiscriminatory, and do not unduly impact customers. There is no provision in PURA § 36.213 or in the GCRR Rule, that relieves the Commission of that responsibility or divests the Commission of its authority relative to GCRR rates and charges.

Also, as stated previously, the imposition of a cap on the level of invested capital that EPE is allowed to include in GCRR rates would not require the Commission to make any determination of reasonableness or prudence of EPE’s capital investment. Those determinations would continue to be reserved for consideration in EPE’s next base rate case.

Finally, OPUC’s proposal to set the maximum capital investment for Newman Unit 6 that EPE should be allowed to recover through a GCRR is driven by the fact that EPE’s most recent

²³ See PURA § 14.001.

estimated final capital cost for Newman Unit 6 is more than 26% higher than EPE included in the CCN case. The capital investment for Newman Unit 6 that EPE provided in the CCN case was reviewed and relied upon by the parties and was included in the Final Order for Docket No. 50277. Furthermore, that estimated final capital cost was based on EPE's expectation that the construction would be completed in June 2023. As of July 6, 2023, there has been no indication that construction of Newman Unit 6 is complete. Therefore, the final actual capital investment, including AFUDC, for Newman Unit 6 may be significantly larger than EPE has indicated in this filing. Additionally, it is notable that had the actual final capital investment, including AFDUC, been contemplated in this proceeding it would likely require EPE to come in for a base rate case eighteen months after the date the GCRR takes effect. However, as it stands, EPE's calculation comes in right under the \$200 million threshold.²⁴

EPE's objection is that the Commission is prohibited from using a cap on the actual Newman Unit 6 capital costs despite the fact that the cap would be based on the total capital cost EPE provided in the CCN case. If EPE's position is carried to its logical conclusion, the Commission would be prohibited from using a cap even if the actual capital costs exceeded the costs in the CCN Case by 100%, 200%, or more. OPUC does not believe that logic would enable the Commission to apply reasonable and responsible regulatory oversight to utilities it regulates.

VIII. CONCLUSION

No portions of Evans Direct should be excluded from consideration in this case. EPE is only the second utility to request a GCRR and this is the first case in which a utility has requested recovery of actual costs that exceeded the estimated total cost included in the approved CCN for the new generating facility, this is a case of first impressions for the Commission. Therefore, it is vitally important the Commission has all the information necessary to be fully informed and make a just and reasonable decision on the amount of invested capital and associated costs for Newman Unit 6 that EPE should be permitted to recover through a GCRR before any determination of the reasonableness or prudence of costs have been made.

The sections of Evans Direct to which EPE objected are relevant to issues in EPE's GCRR

²⁴ 16 TAC § 25.248(j).

filing and provide material information that will enable the Commission to make informed decisions in this docket. Evans Direct provides information that is necessary to enable the Commission to appropriately apply reasonable and responsible regulatory oversight and to make fully informed decisions concerning the appropriate amount of EPE's actual, incurred costs for Newman Unit 6 that should be recovered through a GCRR.

Date: July 6, 2023

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ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE
SOAH DOCKET NO. 473-23-18990
PUC DOCKET NO. 54659

I hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 6th day of July 2023 by facsimile, electronic mail, and/or first class, U.S. Mail.

A handwritten signature in black ink, appearing to read 'Renee Wiersema', is written above a horizontal line.

Renee Wiersema